

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JAMES D. JACOBUS,

Complainant,

v.

Chancellor, UNIVERSITY OF
WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 88-0159-PC-ER

* * * * *

FINAL
DECISION
AND
ORDER

After having reviewed the Proposed Decision and Order and the arguments presented in relation thereto by the parties and consulting with the hearing examiner, the Commission adopts the Proposed Decision and Order in its entirety and adds the following to the Opinion Section:

Complainant cites Rogers v. Lehman, 869 F2d 253, 49 FEP 351 (4th Cir. 1989) for the proposition that an employer has an affirmative obligation to determine whether an employee is handicapped and whether and how this handicap could be accommodated. Complainant appears to overstate the reach of this decision. In Rogers, the employer was notified by the employee's physician that he was suffering from alcoholism. This is certainly distinguishable from the facts presented by the instant case where respondent had been informed that complainant was a slow learner but not that complainant had a particular handicap, where complainant had indicated on one of his application forms that he did not have a handicap which required an accommodation, and where complainant had indicated in response to questions from Mr. Ricc (See Finding of Fact 14) and Mr. Sprang (See Finding of Fact 19) that he did not have a problem which was affecting his work performance. In addition, in Rogers, there was good reason for the employer to suspect a clear causal connection between the employee's alcoholism and his performance problems, i.e., excessive absenteeism. Once again, as the

Commission concluded in the instant case, that situation does not exist here. The Rogers court went on to decide that, once the employer became aware of the employee's handicapping condition, i.e., alcoholism, and, once there was good reason for the employer to suspect that the employee's poor job performance resulted from his alcoholism, then the employer had a duty to inform the employee of available counselling services, to provide the employee with a firm choice between treatment and discipline, and to provide the employee with an opportunity to participate in available treatment. As stated above, we never reach this point in the instant case since complainant failed to show that respondent was or should have been aware of his handicapping condition and that there was good reason for the employer to suspect a clear causal connection between his handicapping condition and his work performance problems. Contrary to the complainant's argument, the Rogers decision does not hold that an employer has a duty to ferret out the cause of an employee's performance problems in a situation where there is no obvious handicap or where the employee has not informed the employer of a handicap, or that an employer's failure to determine the cause of an employee's performance problems demonstrates a failure to accommodate any handicap the employee may have. In addition, the Rogers court was careful to limit its holding to the unique characteristics of the disease of alcoholism and to the accommodation requirements imposed on federal agency employers by the Rehabilitation Act of 1973 (29 U.S.C. §791). Neither situation exists here. Complainant's handicap is not that of alcoholism or any other treatable disease and the accommodation requirement imposed on federal agencies by the Rehabilitation Act of 1973 is not identical to that imposed on state agencies by the FEA.

Complainant also argues that the Commission's holding in Betlach-Odegaard v. UW, 86-0114-PC-ER (1990), is applicable to the facts of this case. The Commission agrees with complainant that this holding imposes upon an employer who is or should have been aware of an employee's or prospective employee's handicap an obligation to explore and to consider possible accommodations. Under the facts in Betlach-Odegaard, the prospective employee had a very obvious visual handicap which clearly interfered with her ability to perform the tasks of the job for which she was competing. That


is not the situation here. Complainant's handicap was not obvious to his employer or to a professional vocational specialist or even to himself.

Dated: March 19, 1992

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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PROPOSED
DECISION
AND
ORDER

Nature of the Case

This is a complaint of handicap discrimination. On March 13, 1991, one of the Commission's equal rights officers issued an initial determination finding probable cause to believe that discrimination had occurred as alleged. A hearing was held on July 18 and 19, 1991, before Laurie R. McCallum, Chairperson. The briefing schedule was completed on October 8, 1991.

Findings of Fact

1. Complainant was first hired by the State of Wisconsin on September 13, 1977, as a Building Maintenance Helper 2 (BMH 2) at the Central Wisconsin Center within the Department of Health and Social Services. Complainant transferred to Mendota Mental Health Institute (MMHI) on November 29, 1981, in order to change his work schedule, i.e., the position at MMHI did not involve night or holiday work. Complainant was required to serve a probationary period at MMHI. Complainant's final probationary report indicated ratings of "poor" in two of the eight categories, ratings of average in five categories, and a rating of good in the category of dependability; and stated that "this employe likes to waste time, he is a slow worker and slow in becoming familiar with the proper methods, and requires close guidance."

2. In 1986, Scott Smith became complainant's supervisor at MMHI. Mr. Smith did not consider complainant's work performance to be satisfactory. This was based on Mr. Smith's observation that complainant did not

consistently complete all cleaning tasks and that his work did not consistently conform to MMHI's standards. As a result, Mr. Smith reassigned complainant to a unit where he would not be distracted by building occupants. This assignment entailed a much lighter work load than the assignments of the other four BMH 2's under Mr. Smith's supervision. After this reassignment, complainant's performance did not improve despite one-on-one retraining both orally and through demonstration, by Mr. Smith. In September of 1987, Mr. Smith placed complainant on a Concentrated Performance Planning and Development program in an attempt to improve complainant's performance. In a report dated September 9, 1987, Mr. Smith noted that complainant had failed to mop or sweep a bathroom floor; had failed to clean certain bathrooms to department standards, i.e., hair and other residue were still noticeable on the sinks; and failed to empty trash which had resulted from a picnic four days before. In a report dated October 6, 1987, Mr. Smith noted that complainant had failed to sweep certain common areas, had failed to clean certain trash cans, had failed to dust certain offices completely, had not cleaned certain chalkboards, had not rinsed mops and buckets, and had stored a buffing machine in an incorrect location. In a report dated November 3, 1987, Mr. Smith noted that complainant had failed to sweep or vacuum certain offices and common areas; had failed to empty certain trash cans, had failed to dust certain window ledges and stairways, had failed to clean certain bathrooms completely and had failed to clean one at all, and had failed to clean mops and buckets. In this report, Mr. Smith indicated that complainant had demonstrated that he could perform his job duties satisfactorily but failed to do so on a consistent basis. Mr. Smith also noted that, in his opinion, if complainant could perform the same limited tasks each day, such as only cleaning bathrooms, he would be able to perform satisfactorily, but that it would not be possible to structure a BMH 2 job at MMHI in this way. In a report dated December 2, 1987, Mr. Smith noted performance deficiencies similar to those in the previous reports but more numerous. Mr. Smith spent 100% more time with complainant during the Concentrated Performance Planning and Development period than with his other subordinate employees. Mr. Smith's time with complainant accounted for 50% of his total work time during this period. Prior to this period, Mr. Smith spent 25% of his time with complainant. Subsequently, Mr. Smith advised complainant that it may be in his best interest if he found work

elsewhere and suggested employment with a different state agency where complainant could work second or third shift and not be distracted by building occupants.

3. Mr. Smith determined that the University of Wisconsin-Madison Physical Plant had vacancies in BMH 2 positions and encouraged complainant to apply for a transfer to one of these positions. Mr. Smith also contacted Sharon Gaulke, a Housekeeping Services Supervisor 3 at the Physical Plant, to discuss complainant. Mr. Smith told Ms. Gaulke in this conversation that complainant was a slow learner, that he could perform the work in a structured environment, that he needed a run where he could perform the same routine for at least a week or two, and that he needed one-on-one training. Mr. Smith did not advise Ms. Gaulke that complainant's work performance had been consistently unsatisfactory or that complainant had been placed on a Concentrated Performance Planning and Development program and had not improved his performance during the course of this program. Ms. Gaulke informed Mr. Smith that she had a supervisor who had worked successfully with slow learners. Ms. Gaulke was also contacted by complainant's mother who indicated that complainant had experienced performance problems at MMHI and needed a job where he could succeed. Complainant's mother did not tell Ms. Gaulke that complainant was handicapped or disabled.

4. Complainant applied for transfer to the Physical Plant. On January 24, 1988, complainant completed a form which served as a supplement to his application. On this form, he indicated that he had no physical limitations which would prevent or restrict his performance of any of the tasks of the position in a safe and efficient manner. On February 15, 1988, complainant completed a Personal Data Questionnaire on which he indicated that he did not have a handicap which required an accommodation. On February 15, 1988, complainant's transfer to the Physical Plant as a BMH 2 was effected and he was assigned to a crew supervised by Mark Rice, the supervisor Ms. Gaulke had in mind during her conversation with Mr. Smith. Complainant was advised in his February 2, 1988, appointment letter that he would be required to serve a six month probationary period. The Physical Plant requires this of all BMH 2 transfers.

5. Ms. Gaulke advised Stephen Keller, Mr. Rice's first-line supervisor, that Mr. Smith had told her that complainant was a slow learner and needed

extra guidance and support. Neither Ms. Gaulke nor Mr. Keller passed this information on to Mr. Rice. In a conversation on complainant's first night at the Physical Plant, complainant told Mr. Rice that he had not been meeting performance expectations at MMHI and had transferred to the Physical Plant because he feared he was going to be fired from MMHI. Complainant, during this conversation, did not mention a handicap or disability.

6. Mr. Rice was responsible for supervising Crew #4. Crew #4 was assigned to clean 13 buildings and had 9 authorized BMH 2 positions but, at any one time during Mr. Rice's tenure, only 5 to 7 of the positions were filled. Of these 5 to 7 BHM 2's, 4 to 5 of them were assigned to area cleaning on designated "runs," and the remainder to floor care for the 13 assigned buildings. If a BMH 2 was absent, his or her work assignments would be distributed among the remaining BMH 2's. The BMH 2's assigned to area cleaning worked alone. Those assigned to floor care generally worked together as a team. Run sheets were prepared for each of the runs which listed the rooms to be cleaned, the schedule for cleaning the rooms, and any special cleaning needs. The run and run schedule were the same each week. If a BMH 2 assigned to a run had any problem meeting the run schedule, a more detailed schedule was prepared and given to this BMH 2. A BMH 2 assigned to a run took both the run sheet and the cleaning procedure manual with him or her as he or she was completing the run. Complainant understood the run sheets and the run schedules, and had no trouble finding the rooms listed on the run sheets for the runs to which he was assigned.

6. Mr. Rice personally trained the BHM 2's on his crew. Mr. Rice assigned each trainee first to a typical but simple run. On the first night of training, Mr. Rice would walk through the run with the trainee and explain tasks, rules, and procedures. On the second night of training, Mr. Rice would actually perform the run with the trainee observing. On the third night of training, Mr. Rice would accompany the trainee as the trainee performed the run. After the third night, the trainee was expected to perform the run independently but Mr. Rice closely monitored this performance by frequently checking the trainee's work and bringing the trainee back to an area and showing him or her what improvement was needed. This is the practice followed by Mr. Rice in training complainant. It was anticipated that a trainee

would master this first run in 2 to 3 weeks. After that, each BMH 2 was cross-trained on the other runs and on floor care.

7. During the first three days of training complainant, Mr. Rice did not observe that complainant had problems learning the job and concluded, based on complainant's performance, that complainant understood what Mr. Rice was telling and showing him.

8. In a 30-day performance evaluation signed by complainant on March 11, 1988, Mr. Rice rated complainant's performance as average in two categories and below average in six and noted that "Jim is a hard worker who perseveres to complete his assigned work satisfactorily. However, he has frequently missed trash cans, skipped fixtures which require daily cleaning, and left supplies out where they do not belong. Just recently, Jim has paid more attention to his work and reviewed it for thoroughness, therefore showing significant improvement."

9. Mr. Rice routinely monitored the quality of the cleaning work done by each of his subordinate BMH 2's by periodically performing a Quality Assurance review of a day's cleaning by that BMH 2. In a Quality Assurance review of complainant's work conducted on March 17, 1988, Mr. Rice rated nine factors as needing improvement, eight as satisfactory, and one as excellent. In a Quality Assurance review of complainant's work conducted on March 24, 1988, Mr. Rice rated seven factors as needing improvement, 12 as satisfactory, and one as excellent. In a Quality Assurance review of complainant's work conducted on March 29, 1988, Mr. Rice rated three factors as needing improvement, thirteen as satisfactory, and two as excellent and noted that "Now things are looking better!" In a Quality Assurance review of complainant's work conducted on April 6, 1988, Mr. Rice rated six factors as needing improvement, eleven as satisfactory, and two as excellent.

10. In a 90-day performance evaluation of complainant, Mr. Rice rated complainant as unsatisfactory in Quality of Work, below average in three categories, and average in four categories and noted: "Although Jim has shown the ability to complete the amount of work required, he has continued to miss trash cans, skip items which require daily cleaning, and leave things out where they do not belong. I have repeatedly instructed him in the correct procedures and job standards, yet these deficiencies have continued. While a good portion of Jim's work is completed satisfactorily, the overall quality of his

work can not be considered acceptable if these basic responsibilities are not completed."

11. As part of the standard training process and to see if complainant's performance would change if he were assigned to a different run, Mr. Rice, in late May of 1988, assigned complainant to the run which included the protection and security building. Mr. Rice walked through the run with complainant; reviewed the run sheet as they were walking through the run; and gave him instructions, both orally and through demonstration. The BMH 2 who had, until complainant's reassignment, performed this run gave complainant a detailed listing of tasks, including time guidelines for completing each set of tasks. Although this run involved the same basic tasks as complainant's earlier run, it was complicated somewhat by the fact that building occupants were there during complainant's shift. Mr. Rice reviewed the quality of complainant's work on this run on an almost daily basis and provided frequent retraining to complainant and frequently discussed with complainant areas needing improvement. In a memo to Mr. Keller dated June 24, 1988, Mr. Rice stated as follows:

Today I went through 101 N. Mills (Protection and Security) with Jim and showed him a great number of discrepancies. I pointed out dusty surfaces all over. Dirt and debris in corners, stairs, and under furniture. Two lights out which have been out for several days. Door glass which should be cleaned daily, and which he says was last cleaned on Monday (five days ago). Two restrooms where toilet paper rolls were left too low and had to be restocked by the building occupants. Two urinals which are not adequately being maintained and smell worse than they look.

In addition to the above, Jim left a half dozen fluorescent tubes in a trash can right next to the employee's refrigerator. This is an extreme hazard to the building occupants. I instructed him to immediately put them in the box before someone gets hurt.

Jim has been cleaning this building for four weeks. It is now readily apparent the overall cleanliness of the building is rapidly deteriorating. I do not want another employee to be responsible for bringing the building back up to acceptable standards. Therefore, I have instructed Jim to clean the building from 3:30 p.m. to 7:30 p.m. as he has been doing for the past four weeks. From 8:00 p.m. to midnight he is to remain in the building correcting the aforementioned discrepancies. His other buildings, 35 N. Orchard and 1220 Capital Court, will be temporarily cleaned by another employee.

12. After complainant had been with the Physical Plant about two months, Mr. Rice trained complainant to perform floor care tasks. This is Mr. Rice's standard practice with new BHMH 2's. Despite one-on-one training and retraining, complainant never performed this task satisfactorily.

13. Mr. Rice spent substantially more of his time retraining and supervising complainant than he spent with other probationary employees. Mr. Rice had trained slow learners before and those who had showed steady improvement in their work performance had passed probation. Mr. Rice did not feel that, like these slow learners, complainant had demonstrated difficulty in learning to perform tasks or follow directions. Mr. Rice did not feel that complainant's work performance showed a pattern of improvement on either of the runs to which he was assigned. Although complainant's work would occasionally show improvement, such improvement would not last. Mr. Rice had also supervised subordinate BMH 2's who were not slow learners or who did not have any handicaps or disabilities of which he was aware and some of these subordinates had trouble performing their assigned runs in a satisfactory manner and did not pass probation.

14. In discussing performance deficiencies, Mr. Rice had asked complainant if there was a reason for the problems and complainant did not indicate there was.

15. In a memo to Mr. Keller dated June 20, 1988, Mr. Rice recommended that complainant be terminated. In this memo, Mr. Rice noted repeated failures by complainant to adequately clean and maintain his assigned area, that these failures have continued to be repeated despite frequent reminders, and that complainant was unable to work independently as expected of BMH 2's.

16. Complainant was aware that Mr. Rice's continuing dissatisfaction with his work performance could jeopardize his job. When he mentioned this to a co-worker, she mentioned that she had received assistance from the Division of Vocational Rehabilitation (DVR) of the Department of Health and Social Services. Complainant contacted DVR on or around May 20, 1988, and was referred to DVR Counselor Roger Worachek. Complainant first met with Mr. Worachek on June 2, 1988, and explained that he was having troubles with his employment. Mr. Worachek explained to complainant the process for qualifying for services from DVR. Complainant asked Mr. Worachek at this meeting to contact his supervisors and Mr. Worachek indicated he would do so.

As a result of this meeting, Mr. Worachek assumed that complainant was mentally retarded or learning disabled but concluded that this could not be established without further testing. Mr. Worachek's notes of this meeting also indicated that complainant had indicated that he was having marital problems which were affecting his ability to concentrate on his job. DVR received complainant's application for DVR services on June 17, 1988. It usually took approximately 90 days for DVR to reach a determination as to an applicant's eligibility for DVR's services.

17. Mr. Worachek called Mr. Rice at 3:30 p.m. on June 22, 1988. As a result of this conversation, Mr. Rice wrote a memo to Mr. Keller which stated, in pertinent part:

He told me that he is with the Division of Vocational Rehabilitation. He said one of my employees, James Jacobus, had talked to him about some problems he has been experiencing at the Physical Plant. Mr. Jacobus showed Mr. Worachek his 30 and 90 day evaluations and expressed a concern about his future at the Physical Plant.

Mr. Worachek asked me if we could set up a meeting with Mr. Jacobus, the appropriate Physical Plant Managers, and myself. I told him I had no authority to set up such a meeting, but would pass on the information to my supervisor.

Mr. Worachek can be reached at 267-7742. He said he would be in Sun Prairie on Thursday, 6/23/88, but would be back on Friday. He also said he would be going on a long vacation starting next Wednesday, 6/29/88.

18. Mr. Keller shared Mr. Rice's memo with Don Sprang, the Physical Plant's Personnel Manager. Mr. Sprang called Mr. Worachek on Friday, June 24, 1988. Mr. Worachek was meeting with a client at the time of the call and, as a result, the conversation was brief. Mr. Sprang indicated that complainant would likely be terminated during probation and assumed Mr. Worachek would call him back. Mr. Worachek told Mr. Sprang that he was going on vacation starting June 29, 1988. Mr. Worachek did not explain to Mr. Sprang the specific services that DVR could or would provide to complainant since he had not yet been accepted as a client. Mr. Worachek did not suggest possible accommodations for complainant or indicate that complainant was handicapped since the evaluation of complainant had not yet been completed. Mr. Worachek made no recommendations or requests relating to

complainant's employment. Mr. Worachek did not call Mr. Sprang back prior to leaving on his vacation.

19. In the six-month evaluation of complainant's performance, Mr. Rice rated complainant's performance as unsatisfactory in three categories, poor in four categories, and average in one category and noted that "Jim does not perform productively in the absence of close supervision. He lacks independent judgment and requires continued instruction and retraining. He strays from established procedures and forgets to perform assigned duties. Despite repeated training and instruction, Jim has shown little improvement." Mr. Sprang met with complainant to discuss the recommendation for his termination. When Mr. Sprang asked complainant during this meeting if he had any problem of which the Physical Plant should be aware, complainant did not mention that he had a handicap, that he needed an accommodation, or that he had a problem. In a letter from Mr. Sprang dated July 8, 1988, complainant was advised that, due to unsatisfactory work performance, he would be terminated effective July 8, 1988.

20. Subsequent to his termination, DVR determined that complainant was vocationally handicapped and, as a result, eligible for DVR services. This determination was based at least in part on the results of a psychological evaluation of complainant conducted by Dr. Daniel Levin on August 3, 1988. Dr. Levin determined that complainant had "borderline mental retardation" based on a Full Scale I. Q. of 72. This category of intellectual abilities, i.e., "borderline mental retardation" was eliminated from general use in the field of psychological assessment in 1973. In addition, the procedure followed by Dr. Levin in completing his assessment of complainant was not in accord with the procedure generally acknowledged to be the standard in the field of psychological assessment in that it did not adequately assess adaptive functioning nor adequately document childhood experience. Based, at least in part, on Dr. Levin's psychological evaluation of complainant, Mr. Worachek concluded that complainant needed a very structured job. Mr. Worachek concluded that complainant would not be able to handle cleaning different rooms on different days, changes in tasks such as the changed location of a trash can to be emptied, filling in for an absent co-worker on a different run, exercising any independent judgment regarding cleaning tasks, or working independently without close supervision and a co-worker on site. Mr. Worachek also

concluded that complainant's BMH 2 position at the Physical Plant was not suited for complainant's disability-related needs. There are no BMH 2 positions at the Physical Plant which do not involve variations in routine.

21. Complainant held several jobs after his termination from the Physical Plant. He worked first for Lovicott Services, Inc., performing janitorial work and was fired from this position. He was later rehired by Lovicott. He then worked for the Regent Apartments where his work was deemed satisfactory by one supervisor but unsatisfactory by a subsequent supervisor and he was fired from this position for unsatisfactory work performance on October 15, 1990. He then worked for DnS Janitorial Service but resigned to take a higher-paying position for the Bruce Company.

22. In an effort to reach a settlement of the instant case, complainant was offered a BMH 2 position at the Physical Plant assigned to the Southeast Recreational Facility. Complainant turned down this position primarily because it involved night and weekend work and some independent decision-making.

23. Complainant filed this complaint of discrimination on October 6, 1988.

24. The hearing in this matter was closed on July 19, 1991. In a brief filed with the Commission on October 8, 1991, complainant cited as authority certain scientific and/or academic publications and attached copies of these publications to his brief. These publications were not a part of the hearing record. On October 11, 1991, respondent filed a Motion to Strike those portions of complainant's brief based upon these publications.

Conclusions of Law

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to prove that respondent discriminated against him on the basis of handicap in terminating his employment.
3. Complainant has failed to sustain this burden.

Opinion

The issue in this case is:

Whether respondent discriminated against complainant on the basis of handicap in violation of the Fair Employment Act (111.31-111.37, Stats.) when they terminated his employment as a BMH 2 at the UW-Madison, Division of Physical Plant, while he was serving a probationary period.

As the Commission stated in Harris v. DHSS, Case Nos. 84-109-PC-ER, 85-0115-PC-ER (2/11/88), a typical handicap discrimination case will involve the following analysis:

- (1) Whether the complainant is a handicapped individual;
- (2) Whether the employer discriminated against complainant because of the handicap;
- (3) Whether the employer can avail itself of the exception to the prescription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., -- i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake undertake the job-related responsibilities of a particular job");
- (4) If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap.

The first question then is whether complainant is handicapped within the meaning of the Fair Employment Act. Section 111.32(8), Stats., defines a "handicapped individual" as an individual who:

- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- (b) Has a record of such an impairment; or
- (c) Is perceived as having such an impairment.

Although the experts may disagree as to the correct label to attach to complainant's intellectual abilities, the record shows that such abilities are below average and have resulted in unusual difficulties for complainant in passing his high school courses, in passing an examination to obtain a driver's license

or any other written examination, in learning to balance his checkbook, in following verbal instructions, in adapting to changes, and in planning or exercising independent judgment. The Commission is of the opinion that these limitations demonstrate a mental impairment which has made complainant's achievement of certain of life's basic activities unusually difficult. This is consistent with the Commission's decision in Brummond v. UW-Madison, Case Nos. 84-0185-PC-ER & 85-0031-PC-ER. In that case, complainant had an organic mental disorder which caused him severe anxiety and interfered with his ability to plan his work or to deal with a variety of different duties or changes in his duties. The Commission decided that the complainant's disorder was a handicap within the meaning of the FEA.

Complainant argues in regard to the definition of "handicap" that the fact that the DVR determined that complainant was handicapped for purposes of qualifying for DVR services leads necessarily to the conclusion that complainant was handicapped for purposes of the FEA. However, not only is the definition of "handicap" applicable to such determinations by DVR not identical to the definition of "handicap" in the FEA, but DVR's administrative application of such term is not binding on the Commission.

The second issue is whether the respondent discriminated against the complainant because of his handicap. There are two ways that discrimination on the basis of handicap under this element can occur. The first would occur if respondent's discharge of complainant had been motivated by complainant's handicap. The second would occur if respondent terminated complainant for performance reasons that were causally related to his handicap. See Conley v. DHSS, 84-0067-PC-ER (6/29/87). In proving discrimination pursuant to the first model, complainant would first have to prove that respondent was aware or should have been aware of complainant's handicap. Complainant argues in this regard that the information received at or around the time of complainant's transfer to the Physical Plant from Mr. Smith and from complainant's mother served as notice to respondent of complainant's handicap. Mr. Smith advised Ms. Gaulke that complainant was a slow learner, that he could perform the work in a structured environment, that he needed a run where he could perform the same routine for at least a week or two, and that he needed one-on-one training. Complainant's mother told Ms. Gaulke that complainant had performance problems in his previous job and that he

needed a job where he could succeed. Although these communications provided notice to respondent that complainant had certain intellectual limitations, these communications did not portray these limitations as so profound or unusual that an inference of the existence of a handicap should have been drawn. Not every physical or mental impairment constitutes a handicap, only those impairments that are profound enough to make achievement unusually difficult. Although Mr. Smith and complainant's mother were aware, to varying degrees, of the extent of complainant's limitations, they appear to have downplayed them during these conversations with Ms. Gaulke so as not to impede the transfer.

Complainant next argues that respondent's contact by a DVR counselor provided notice to respondent that complainant was handicapped. This would be a more convincing argument if the DVR had advised respondent that complainant had been accepted as a DVR client or that an evaluation of complainant had indicated that he was handicapped. This was not done, however, and could not have been done since complainant had not yet been evaluated or accepted as a client. The record does not show that Mr. Worachek communicated during his conversations with Mr. Rice or Mr. Sprang his suspicion that complainant was mentally retarded or learning disabled or handicapped in any other way. The record does show that Mr. Worachek communicated during these conversations that complainant had brought his job concerns to Mr. Worachek and Mr. Worachek had agreed to contact complainant's employer and discuss them. This alone cannot place an employer on effective notice that an employee is handicapped and the Commission so concludes here.

Complainant argues further that it should have been obvious to respondent from observing complainant that he was handicapped. It is noteworthy in regard to this point that complainant testified that he did not realize that he was handicapped until he became aware of the results of Dr. Levin's evaluation after his termination; and that Mr. Worachek, although he suspected that complainant may be learning disabled or mentally retarded, testified that, on the basis of his personal contacts with complainant, he was unable to conclude that he was handicapped. In addition, Mr. Rice, after observing complainant over a period of several months, did not feel, based on his experience training other BMH 2's, that complainant had any unusual difficulty in learning tasks or following directions. On this basis, the Commission does not agree with

complainant that it should have been obvious to respondent that complainant was handicapped.

Finally, complainant's argument implies that this combination of factors should have led respondent to investigate whether complainant had a handicap. The complainant cites no authority for requiring an employer to conduct such an investigation and the commission finds none. In addition, respondent attempted to investigate what the source of complainant's performance problems were but this investigation was cut short when complainant indicated to both Mr. Rice and Mr. Sprang that he did not have a problem of which the Physical Plant should be aware. In addition, on a Personal Data Questionnaire which complainant completed early in his employment at the Physical Plant, complainant indicated that he did not have a handicap which required an accommodation. To adopt complainant's theory in this regard would require an employer to ignore the representations of their job applicants or employee and engage in intrusion and guesswork. The commission does not conclude that this is what the law requires.

The commission concludes that respondent did not have actual or effective notice that complainant was handicapped, and did not perceive complainant to be handicapped, and therefore could not have been motivated to have terminated complainant because of a discriminatory animus with respect to handicap.

In order to establish the second type of handicap discrimination, it would be necessary for complainant to show a causal link between his handicap and his poor work performance in order to prove that he was discriminated against as alleged. The assessment of the nature of complainant's intellectual impairment and the functional limitations such impairment imposes on complainant are presented in the record through the testimony of Dr. Levin and Mr. Worachek and through documents they prepared. These assessments are based primarily, if not exclusively, on Dr. Levin's psychological assessment of complainant. Unfortunately, Dr. Levin's methodology and conclusions are called into serious question through the testimony of Dr. McGivern, a clinical psychologist and expert in the assessment and diagnosis of developmental disabilities at the University of Wisconsin. Not only did Dr. McGivern, based on the current standards in the field of psychological assessment, testify that Dr. Levin's terminology was outdated but, more importantly, that his

assessment failed to adequately review and measure complainant's adaptive functioning. It would be this review and measure of complainant's adaptive functioning which would tell us what effect his intellectual impairment would likely have on his ability to carry out certain tasks. As a result of this, the record is unclear as to the actual effect that complainant's handicap had on his ability to perform the duties and responsibilities of his BMH 2 position at the Physical Plant and, consequently, as to the causal effect between his handicap and his performance problems. Militating against the existence of such a causal effect is the fact that, at one point during complainant's probation, his performance had shown a pattern of steady improvement and he was actually performing the duties and responsibilities of his position in a satisfactory manner. This occurred while complainant was assigned to the original training run. The record does not show that complainant's duties and responsibilities at the time that they were rated as satisfactory were different than his duties and responsibilities at other times he was assigned to this run. In addition, these duties and responsibilities involved cleaning different rooms on different days, changes in tasks such as the changed location of a trash can to be emptied, some independent judgment regarding cleaning tasks, and working without a supervisor or co-worker always on site, i.e., situations which Mr. Worachek concluded complainant would not be able to handle due to his handicap. In addition, Mr. Worachek concluded that, due to his handicap, complainant would not be able to handle changes in routine but should be able to handle performing the same cleaning tasks in the same location each day. However, a review of complainant's performance deficiencies indicates that many of these deficiencies related to cleaning tasks complainant was to perform in the same location each day. Complainant has failed to show a clear causal relationship between his handicap and his performance deficiencies.

The complainant also argues that respondent discriminated against him by failing to await Mr. Worachek's return from vacation before terminating him. First of all, Mr. Sprang assumed that Mr. Worachek would be contacting him before he left on vacation since they had been unable to finish their conversation on June 24, 1988. Although Mr. Worachek was in the office between June 24, 1988, and June 29, 1988, and respondent was aware that he would be, he never made that contact with respondent. The record does not show that Mr. Worachek was waiting for respondent to contact him during that period of

time. This situation, combined with Mr. Worachek's vague representations during the conversation he did have with Mr. Sprang, could hardly be said to put respondent on notice that DVR intended to follow through with them in regard to complainant's employment.

The Commission concludes that complainant has failed to show that he was discriminated against on the basis of his handicap.

If the complainant had shown such discrimination, the next question would become whether respondent can avail itself of the exception to the prescription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment. Although complainant appears to concede this point through reliance on Mr. Worachek's testimony that complainant's BMH 2 position at the Physical Plant was not suited for complainant's disability-related needs, once again this conclusion is not sustained by the evidence in the record that, at one point during his assignment to the original training run, complainant had shown a pattern of steady improvement and was actually performing the duties and responsibilities of his position in a satisfactory manner.

The final issue under the Harris analysis is whether respondent failed to reasonably accommodate the complainant's handicap. Of course, an accommodation would only be required if respondent was aware or should have been aware of complainant's handicap. As concluded above, this was not the case. In fact, complainant had several opportunities to disclose his handicap to respondent but his only response was a denial that he was handicapped or that he had any other problem which was interfering with his job performance. In addition, neither complainant nor Mr. Worachek ever requested or proposed an accommodation prior to complainant's termination.

Even if the Commission had concluded that respondent was aware or should have been aware of complainant's handicap, complainant has failed to show that respondent would have been required to do something to accommodate complainant other than what they did. Respondent provided extensive one-on-one training, retraining, and monitoring of complainant and Mr. Rice spent substantially more time with complainant than with his other subordinates despite chronic under-staffing. Complainant argues that respondent

was required to restructure complainant's BMH 2 position so that he could perform the same cleaning tasks in the same location every day and so that he would have a co-worker or supervisor on site. Section 111.34(1)(b), states that it is employment discrimination based on handicap to refuse to reasonably accommodate an employee's handicap "unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program" Given the chronic under-staffing of the Physical Plant cleaning crews, the large area required to be cleaned each night, the inefficiency of having one BMH 2 do only certain tasks in an area which would require another BMH 2 to go to that same area and do the remaining tasks, and the lack of flexibility the proposed accommodation would have on the Physical Plant's ability to cover for absent employees, the Commission concludes that this proposed accommodation would pose a hardship on respondent's program. Complainant also argues that providing a job coach from DVR would have been a reasonable accommodation and yet this was not done by respondent. It should be noted that complainant did not propose this or any other accommodation to respondent prior to his termination. In addition, in view of the intensive training, both orally and through demonstration, provided by Mr. Rice who is an expert in this job and this type of work and who is experienced in successfully training slow learners, it is doubtful that the addition of a job coach would have had any different result. Complainant further argues that transferring complainant to a different position would have been a reasonable accommodation. Mr. Sprang and Ms. Gaulke both testified that there were no BMH 2 positions at the Physical Plant which did not involve variations in routine or filling in for co-workers on different runs or on floor care, both of which complainant has cited as requirements of a transfer position. Once respondent made this showing, the burden would shift to complainant to rebut this showing. Prewitt v. USPS, 662 F. 2d 292, 27 FEP Cases 1043 (5th Cir. 1981). This complainant has not done. There is no showing in the record that there was a BMH 2 position or any other position to which complainant could have transferred which met the criteria complainant argues his handicap demands. Finally, respondent argues that the offer of the SERF position to complainant after his termination constitutes an accommodation. The Commission does not view these post-termination actions or any actions resulting from settlement negotiations to be relevant to the decision of this matter. The Commission

concludes that respondent did not fail to reasonably accommodate complainant's handicap.

Motion to Strike

On October 11, 1991, respondent filed a Motion to Strike certain post-hearing evidence contained in complainant's reply brief. This evidence consisted of excerpts from certain scholarly and/or scientific publications which were not offered or received into the hearing record.

Complainant argues that this Motion should be denied based on the fact that §227.45, Stats., allow the hearing examiner to take official notice of such publications after hearing. The Commission does not believe that this is the intent of §227.45(3), Stats. The taking of official notice of certain evidence, just like the taking of any other evidence, must be done on the hearing record. The hearing record in this case has been closed and complainant made no effort, through an offer of rebuttal evidence or otherwise, to introduce these materials into the record prior to the close of the hearing. For that reason, respondent's Motion to Strike is granted.

Order

Respondent's Motion to Strike is granted. This complaint is dismissed.

Dated: _____, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

gdt

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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